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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust Litigation) File No. 18-CV-1776
) (JRT/HB)
)
) St. Paul, Minnesota
) November 19, 2019
) 9:30 a.m.

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING)

APPEARANCES

For Direct Purchaser
Plaintiffs:

LOCKRIDGE, GRINDAL, NAUEN, PLLP
BRIAN D. CLARK, ESQ.
100 Washington Ave. S., #2200
Minneapolis, MN 55401

PEARSON, SIMON & WARSHAW, LLP
CLIFFORD PEARSON, ESQ.
(via telephone)
15165 Ventura Blvd., #400
Sherman Oaks, CA 91403

PEARSON, SIMON & WARSHAW, LLP
JOSEPH BOURNE, ESQ.
800 LaSalle Ave., #2150
Minneapolis, MN 55402

For the Consumer
Indirect Purchaser
Plaintiffs:

GUSTAFSON GLUEK, PLLC
BRITTANY RESCH, ESQ.
DANIEL GUSTAFSON, ESQ.
(via telephone)
120 S. 6th St., #2600
Minneapolis, MN 55402

HAGENS, BERMAN, SOBOL, SHAPIRO
SHANA E. SCARLETT, ESQ.
715 Hearst Ave., #202
Berkeley, CA 94710

1 For the Commercial
2 Direct Purchaser
3 Plaintiffs:

LARSON KING, LLP
SHAWN M. RAITER, ESQ.
30 E. 7th St., #2800
St. Paul, MN 55101

4
5 For Defendant Triumph
6 Foods:

CUNEO, GILBERT & LaDUCA, LLP
ALEC BLAINE FINLEY, ESQ.
(via telephone)
4725 Wisconsin Ave. NW, #200
Washington, DC 20016

7
8 For Defendant JBS USA:

HUSCH BLACKWELL
GENE SUMMERLIN, ESQ.
(via telephone)
13330 California St., #200
Omaha, NE 68154

9
10 For Defendant
11 Smithfield Foods:

SPENCER FANE, LLP
DONALD G. HEEMAN, ESQ.
100 S. 5th St., #1900
Minneapolis, MN 55402

12
13 For Defendant Tyson
14 Foods:

QUINN EMANUEL URQUHART &
SULLIVAN
SAMI H. RASHID, ESQ.
(via telephone)
51 Madison Avenue
22nd Floor
New York, NY 10010

15
16 For Defendant
17 Smithfield Foods:

LARKIN, HOFFMAN, DALY & LINDGREN
JOHN A. COTTER, ESQ.
8300 Norman Center Dr., #1000
Minneapolis, MN 55437

19
20 For Defendant Tyson
21 Foods:

AXINN, VELTROP & HARKRIDER, LLP
TIFFANY RIDER ROHRBAUGH, ESQ.
(via telephone)
950 F Street NW,
7th Floor
Washington, DC 20004

23
24 For Defendant Tyson
25 Foods:

DYKEMA GOSSETT, PLLC
DAVID GRAHAM, ESQ.
90 S. 7th Street
4000 Wells Fargo Center
Minneapolis, MN 55402

1

2

For Defendant Seaboard
Foods:

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For Defendant Clemens
Food Group:

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STINSON, LLP
WILLIAM GREENE, ESQ.
50 S. 6th St., #2600
Minneapolis, MN 55402

KIRKLAND & ELLIS, LLP
CHRISTINA BRIESACHER, ESQ.
CHRISTINA SHARKEY, ESQ.
300 North LaSalle
Chicago, IL 60654

GREENE ESPEL, PLLP
MARK JOHNSON, ESQ.
222 S. 9th St., #2200
Minneapolis, MN 55402

FAEGRE, BAKER, DANIELS, LLP
RICHARD DUNCAN, ESQ.
EMILY CHOW, ESQ.
90 S. 7th St., #2200
Minneapolis, MN 55402

DORSEY & WHITNEY, LLP
JAIME STILSON, ESQ.
50 S. 6th St., #1500
Minneapolis, MN 55402

HOGAN LOVELLS US, LLP
JUSTIN W. BERNICK, ESQ.
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004

For Defendant Agri
Stats, Inc.:

Proceedings recorded by mechanical stenography;
transcript produced by computer.

PROCEEDINGS

IN OPEN COURT

6 THE COURT: Good morning, everyone. Please be
7 seated.

8 We are on the record in the In Re Pork Antitrust
9 Litigation, Matter No. 18-CV-1776. And specifically we are
10 here on defendant's motion for a protective order concerning
11 ex parte lawyer communications, which is Docket No. 374.

12 I know that my law clerk has gone through and
13 figured out who's here, but we should probably make a record
14 of that for the transcript as well. So let me go through
15 each of the groups and get on the record who is here, and if
16 you could also indicate for me as you introduce yourself
17 whether you intend to be heard today or whether you're just
18 going to be listening intelligently and attentively to the
19 proceedings.

20 So let's start with counsel for the Direct
21 Purchaser Plaintiffs.

22 MR. CLARK: Your Honor, Brian Clark, Lockridge,
23 Grindal, Nauen for Direct Purchaser Plaintiffs. I intend to
24 only listen.

25 THE COURT: How about -- well, anybody else here

1 for the Direct Purchaser Plaintiffs?

2 MR. BOURNE: Yes. Good morning, Your Honor --

3 MR. PEARSON: Yes, Your Honor. Clifford Pearson,
4 Pearson, Simon & Warshaw.

5 THE COURT: All right. Good morning.

6 MR. PEARSON: I don't intend to speak, Your Honor.

7 THE COURT: All right. Thank you.

8 MR. PEARSON: I will listen intently.

9 THE COURT: Okay. Sounds good.

10 MR. BOURNE: And Joe Bourne from Pearson, Simon &
11 Warshaw.

12 THE COURT: Very well. And you are not intending
13 to argue either?

14 MR. BOURNE: No, Your Honor.

15 THE COURT: Okay. Anybody else here, whether in
16 person or on the phone, for the Direct Purchaser Plaintiffs?
17 All right.

18 Let's turn then to the Commercial Institutional
19 Indirect Purchaser Plaintiffs. Who's here on behalf of that
20 group?

21 MR. RAITER: Shawn Raiter, Your Honor. I do not
22 intend to speak.

23 THE COURT: Okay. Who else?

24 MR. FINLEY: Blain Finley on the phone, and I do
25 not intend to speak.

1 THE COURT: And how about on behalf of the
2 Consumer Indirect Purchaser Plaintiffs?

3 MS. SCARLETT: Shana Scarlett from Hagens, Berman.
4 And I will be speaking on behalf of the Consumer Indirect
5 Purchaser Plaintiffs.

6 MS. RESCH: And Brittany Resch from Gustafson
7 Gluek, and I do not intend to speak.

8 MR. GUSTAFSON: Good morning, Your Honor. Dan
9 Gustafson on behalf of Consumer Indirect Purchaser
10 Plaintiffs, and I will not be speaking.

16 MR. BERNICK: Yes, Your Honor. This is Justin --

17 THE COURT: Go ahead.

18 MR. BERNICK: Sorry. Yes, Your Honor. This is
19 Justin Bernick from Hogan Lovells on behalf of Agri Stats.

20 THE COURT: All right. Thank you.

22 How about on behalf of Clemens Food Group?

23 MS. BRIESACHER: Good morning, Your Honor.

24 Christina Briesacher from Kirkland & Ellis, and I will be
25 presenting our motion today.

1 MS. SHARKEY: Good morning, Your Honor. Christina
2 Sharkey, also from Kirkland Ellis. I do not intend to speak
3 today.

4 MR. JOHNSON: Mark Johnson from Greene Espel, Your
5 Honor. I won't be speaking.

6 THE COURT: Anyone on the phone for the Clemens
7 Food Group?

8 Turning to Hormel.

9 MR. DUNCAN: Richard Duncan and Emily Chow from
10 Faegre, Baker, Daniels, and we will not argue.

11 THE COURT: Anyone on the phone for Hormel?

12 Turning to Indiana Packers.

13 MS. STILSON: Good morning, Honor. Jamie Stilson
14 from Dorsey on behalf of Indiana Packers. I will not be
15 speaking today, Your Honor.

16 THE COURT: And anyone on the phone for Indiana
17 Packers?

18 How about Seaboard Foods?

19 MR. GREENE: Your Honor, William Greene of Stinson
20 for the Seaboard Defendants. I will not be speaking today.

21 THE COURT: Anyone on the phone for Seaboard?

22 Smithfield Foods.

23 MR. COTTER: Good morning, Your Honor. John
24 Cotter from Larkin Hoffman for Smithfield Foods. I will not
25 be speaking.

1 THE COURT: Anyone on the phone for Smithfield
2 Foods?

3 Triumph Foods?

4 MR. SUMMERLIN: Good morning, Your Honor. This is
5 Gene Summerlin from Husch Blackwell on behalf of Triumph,
6 and I don't intend to speak today.

7 THE COURT: Anyone else for Triumph?

8 Tyson Foods.

9 MR. GRAHAM: David Graham from Dykema Gossett. I
10 don't intend to speak today.

11 THE COURT: Anyone else for Tyson?

12 MS. ROHRBAUGH: And Tiffany Rider Rohrbaugh from
13 Axinn on behalf of Tyson.

14 THE COURT: Okay. JBS.

15 MR. HEEMAN: Good morning, Your Honor. Don Heeman
16 from Spencer Fane on behalf of JBS Defendants. I will just
17 be listening.

18 THE COURT: And is anyone else either in the
19 courtroom or on the phone for JBS?

20 MR. RASHID: Good morning, Your Honor. This is
21 Sami Rashid from Quinn Emanuel on behalf of JBS USA. I
22 don't intend to speak today.

23 THE COURT: Anyone from Mitsubishi?

24 Is there any counsel for any defendant -- oh, I'm
25 sorry. Go ahead.

1 MS. STILSON: Well, Your Honor, I believe they are
2 not in any of the operative complaints, but obviously they
3 are a parent of Indiana Packers.

4 THE COURT: All right.

5 Anyone for any of the defendants, either in the
6 courtroom or on the phone, that I've not yet called on or
7 has not brought themselves to my attention?

8 Okay. Then let's proceed with the motion. And,
9 Ms. Briesacher, I believe you said you'd be arguing for the
10 Defendants.

11 MS. BRIESACHER: Yes, Your Honor.

12 THE COURT: Please go ahead.

13 MS. BRIESACHER: May I proceed, Your Honor?

14 THE COURT: Yes.

15 MS. BRIESACHER: Your Honor, we're here today
16 because, frankly, we have concerns about the tactics that
17 plaintiffs are using when contacting potential witnesses in
18 this case. And while plaintiffs are certainly entitled to
19 conduct an investigation, they must do so within the bounds
20 of the ethical rules, rules that were put in place to impose
21 safeguards on when and how to communicate with represented
22 and unrepresented parties.

23 We're here today --

24 THE COURT: Now, by "parties," though, you're
25 using "parties" sort of in the broadest sense, in other

1 words, represented and unrepresented?

2 MS. BRIESACHER: Individuals, correct, Your Honor.

3 And today we're here to propose guidelines
4 outlining what the law requires in this area. And we
5 believe that these guidelines will benefit all parties, but
6 will really force some rigor into this process as the
7 ethical rules require.

8 Now I'd like to take a minute and just level set
9 how we got here. Mr. John Reininger is a long-time employee
10 of Clemens. He has been employed at the company for nearly
11 30 years. He is a senior executive. His title currently is
12 the Chief Relationship Officer.

13 Mr. Reininger has been known to the plaintiffs
14 since very early in the case. He was on over a dozen
15 organizational charts that we produced, including the most
16 recent. And we also specifically discussed Mr. Reininger
17 with the plaintiffs. They demanded that he be added as a
18 document custodian during the meet and confer process. And
19 in July, we discussed Mr. Reininger on one of our meet and
20 confer calls. And to put this in context, it was a month
21 essentially before they called him -- their investigator
22 called him.

23 You know, what's more, even setting aside what we
24 told them or what was in our documents, really just a simple
25 Google search would have revealed his affiliation with

1 Clemens. This is something that I did on my own, Your
2 Honor. If you just Google "John Reininger," his name
3 appears within the first few hit results. It actually links
4 to his LinkedIn page showing he is a current employee. Or
5 if you Google "John Reininger hog" or "John Reininger pork,"
6 it actually links to the Clemens website and is the first
7 search result. And it links to the current senior
8 leadership of Clemens. It has John Reininger's name, his
9 picture, his title. And that, actually, is the web page we
10 attached at Exhibit 3 to our motion.

11 So plaintiffs cannot say that they did not know he
12 was a current employee. We discussed it with them, and
13 really a simple internet search would have advertised it.
14 Despite knowing that he was a current employee, they called
15 him.

16 THE COURT: Well, and my understanding is
17 plaintiffs' counsel acknowledge that they did know that he
18 was an employee but have said that somehow -- I want to
19 understand better -- but that somehow that word didn't get
20 to the investigator.

21 MS. BRIESACHER: Yes. Correct. Correct.

22 So despite knowing this, their investigator
23 reached out to him. On August 28th, 2019, Mr. Reininger
24 received a voicemail. When he listened to the voicemail,
25 the caller identified himself as a "researcher looking into

1 the pork industry." He didn't mention the lawsuit, his firm
2 or anything about this case.

3 Kind of believing he was just an academic
4 researcher, Mr. Reininger called him back. During the
5 two-minute discussion that followed -- and we know it's two
6 minutes, Your Honor, because we have a record of the call
7 log showing the length of the time, and I have a screenshot
8 here if you're interested in seeing it -- the plaintiffs
9 asked Mr. Reininger questions related to his experience hog
10 farming.

11 Mr. Reininger asked the investigator, you know,
12 what are you looking for? And the investigator only
13 provided some vague responses about looking into information
14 generally.

15 During this two-minute phone call, plaintiffs'
16 investigator did not disclose his affiliation with the firm,
17 disclose his involvement with the case, ask Mr. Reininger
18 where he worked or whether he worked for a defendant, or
19 asked if he was represented.

20 It was only after they hung up that Mr. Reininger
21 thought, you know, there was something off about the call,
22 that it was odd. So he actually looked up the name of the
23 caller and then saw, you know, this wasn't an academic
24 researcher. This was the plaintiffs.

25 When we first put plaintiffs on notice that they

1 spoke with a current employee, they initially denied it.
2 And then we told them no, your assertion is incorrect. You
3 reached out to a current officer and executive of the
4 company that was on our organizational charts and that we
5 spoke about during meet and confers. And then they said
6 that it was an inadvertent error.

7 THE COURT: Is there any information indicating
8 that Mr. Reininger told the investigator anything that --
9 and I know this isn't your only concern -- but that he
10 actually said anything to the investigator that disclosed
11 confidential or privileged or prejudicial information in any
12 way?

13 MS. BRIESACHER: No, Your Honor. We do not
14 believe that there was any privileged communications that
15 Mr. Reininger told the investigator.

16 You know, he'd asked about his experience with hog
17 farming. They talked about that. He actually asked the
18 investigator what he was looking for. And, you know, there
19 were some vague responses and then the call ended.

20 So we agree that there was no privileged
21 communications revealed on that phone call, but that doesn't
22 address our concern that it shouldn't have happened in the
23 first place.

24 THE COURT: About why.

25 MS. BRIESACHER: We found this extremely

1 troubling, particularly that a seemingly experienced
2 investigator who admits that he knew enough about
3 Mr. Reininger to know that he worked with pork companies for
4 awhile, but apparently never connected with his team to know
5 that, yes, this is a current employee or never did even a
6 simple internet search which would have revealed that he is
7 the current Chief Relationship Officer.

8 So this concern is what lead to our request that
9 plaintiffs agree to provide certain disclosures in future
10 interviews to avoid any future mistakes, inadvertent or
11 otherwise.

12 THE COURT: So tell me about your meet and confer
13 process, because it's not feeling like it was really robust
14 here. Now, I understand, and I want to understand this
15 better from plaintiffs' counsel as well that initially said
16 no, it didn't happen, and I realize that could've been
17 off-putting, but still tell me what efforts you made to have
18 a really interactive conversation with plaintiffs' counsel
19 about whether there was harm done on this occasion and what
20 you might be able to agree upon to make sure that it didn't
21 happen again.

22 MS. BRIESACHER: Yes. Your Honor, you know, we
23 engaged in over a month and a half of correspondence with
24 the plaintiffs. It's true --

25 THE COURT: Calling? Was there any calling?

1 MS. BRIESACHER: Your Honor is correct that there
2 were no calls. We engaged in a month and a half of email
3 correspondence with the plaintiffs.

4 It is correct that their final correspondence did
5 offer to meet and confer to the extent we had questions
6 about their proposal. Your Honor, we just didn't have any
7 questions about their proposal. We just didn't agree with
8 it.

9 It's clear that we have a fundamental disagreement
10 on certain aspects of required disclosures, including the
11 timing of disclosures, what disclosures should be provided,
12 and to whom they should be provided. So we believed, Your
13 Honor, that the time was ripe to bring these issues to the
14 Court for some guidance. So that's what we did, Your Honor.

15 THE COURT: So tell me about where -- map out for
16 me where you believe you and plaintiffs agree, presumably
17 there are some areas of overlap, and where you see
18 divergence, where you're asking for this and they're saying
19 no or you're asking for this and they're saying, well, no,
20 not like that, like something else.

21 MS. BRIESACHER: Sure. So I will take this in
22 three bundles. So I'll start with when must disclosures be
23 made. And there, Your Honor, we have a fundamental
24 disagreement on when disclosures must be made.

25 We assert that disclosures, including that you

1 work for plaintiffs, should be made at the outset of any
2 call or interview. Plaintiffs' proposal in contrast says
3 that disclosures will be made only before any kind of
4 "substantive communication." They argued in their
5 opposition that they would be made after some kind of
6 verification of the witness's identity. But really either
7 proposal is unworkable and here's why.

8 If plaintiffs do not need to provide disclosures
9 until a conversation turns "substantive" and if we took
10 Mr. Reininger for example, when would that be? After he
11 talked about his work as a hog farmer? At no point, leaving
12 him with a misimpression entirely because they didn't view
13 the information he provided as substantive? Or kind of
14 taking their proposal on verifying a witness's identity,
15 when do they decide it has been verified, how many minutes
16 into the discussion?

17 Here the investigator spoke with Mr. Reininger for
18 two minutes without ever identifying himself. Two minutes
19 is a really long time to be on the phone with somebody
20 without telling them who you are, your affiliation with the
21 case, or what the purpose of the call is, or asking if
22 they're represented.

23 There's really no benefit to this gray area line
24 drawing that plaintiffs are proposing. The timing here
25 should be simple -- when the call starts -- so everyone

1 knows who is who and what the purpose is. And this will
2 bring to the forefront immediately whether the individual is
3 represented.

4 This simple approach is consistent with the case
5 law we've attached. We've cited to *Eldredge v. City of St.*
6 *Paul*. And there the court required disclosures and said
7 that they should occur "prior to any interview."

8 THE COURT: But is that necessarily across the
9 board? In other words, doesn't it make a difference -- and
10 I realize what didn't happen here that should've happened
11 here was either the investigator being better informed about
12 who he was or wasn't calling in the first place -- but
13 wouldn't the natural place to start be confirming the
14 identity of the individual and finding out right away
15 whether he or she is or isn't a current or former employee
16 of a party?

17 MS. BRIESACHER: Yes. That's what they say, but
18 that's not happening here, because if you get two minutes
19 into a discussion without ever saying, oh, by the way, I'm
20 working for the plaintiffs, are you represented in this
21 case, then whatever method they're doing to verify identity
22 doesn't work. I mean, it takes two seconds to say is this
23 John Reininger? Yes. Okay. Mr. Reininger, I am Matt
24 Isaacs. I work for the plaintiffs' law firm in this case.

25 I mean, if those disclosures would've been made at

1 the outset, this motion could've been avoided. And that's
2 something simple that can be done right at the outset. It
3 takes 15 seconds to do, but it's a check. It's to make sure
4 whatever assumptions you have about whether the plaintiff is
5 a party, whether they're a third party, whether they're
6 adverse or neutral, it's a check on those assumptions if you
7 just simply ask somebody -- tell them about the case and ask
8 if they are represented in the case.

9 So we do have a dispute about when disclosures
10 must be made, and then I have a quick point I want to make
11 about voicemails.

12 So the plaintiffs argue that they should not have
13 to make any disclosures in a voicemail. They claim that
14 making disclosures in a voicemail could lead to "confusion
15 or misunderstandings." However, their current approach of
16 identifying themselves as mere researchers is absolutely
17 causing confusion and is leading to misunderstandings as
18 evidenced by what happened with Mr. Reininger. I mean, he
19 thought they were academic researchers until he himself
20 Googled them after this confusing two-minute call and he saw
21 no, these are the people that are suing us.

1 or against any of the case law or the ethical rules for
2 Mr. Isaacs to say what he said? I'm a researcher. I'm
3 looking into the hog industry. I'd like to talk to you. Is
4 there something more or different that you believe the
5 ethical rules or the case law required if we hypothesize
6 that the person on the other end of the phone was of the ilk
7 that the researcher says he thought they were?

8 MS. BRIESACHER: Yes, and really what you are
9 asking is to whom these disclosures should be made. Should
10 they only be made to current and former? Should they be
11 made to everyone? Really we see for at least kind of
12 certain of the disclosures no difference between the two.

13 Rule 4.3 -- you know, the comments of Rule 4.3
14 state -- and this is dealing with unrepresented parties,
15 third parties in the case, adverse or neutral -- that in
16 order to avoid misunderstandings, a lawyer will typically
17 need to identify the lawyer's client.

18 That rule also contains an obligation to correct
19 any misunderstanding if you reasonably know that the person
20 doesn't kind of understand the lawyer's role in the case.

21 4.4 says a lawyer cannot use methods of obtaining
22 evidence that violate the rights of the third parties.

23 So, at a minimum, with individuals that you
24 believe are true third party, non-adverse witnesses you at
25 least should be identifying yourself, your affiliation with

1 the law firm, and asking if they're represented, again, just
2 as a check.

3 If plaintiffs are able to proceed as they have and
4 not provide any disclosures to individuals that they believe
5 are non-adverse, kind of neutral third parties, then that
6 won't kind of solve the issue that brought us here in the
7 first place, because with Mr. Reininger they didn't believe
8 that.

9 So if they're able to just continue to tell these
10 people that they are researchers in the industry and not
11 provide any of these basic, routine disclosures about who
12 they are and the purpose, it could allow conversations --
13 prohibited conversations like the one that occurred with
14 Mr. Reininger to continue.

15 Now, Your Honor, I'd like to turn next to our kind
16 of next bucket of cases, which is what disclosures must be
17 made. And here we proposed six routine disclosures. As
18 part of our exchange prior to this motion, the plaintiffs
19 kind of appear to agree that their disclosures will now
20 include that the lawyer investigator states their
21 affiliation with the law firm they work for and, two, that
22 they'll inquire and confirm whether the witness is a current
23 employee. Now, they have agreed to do this, again, for
24 certain individuals, the current and formers, but are
25 objecting to anyone else.

1 The parties do have a dispute about some of the
2 remaining disclosures, including inquiring whether the
3 individual is represented, informing the individual they
4 should not divulge privileged communications, and their
5 rights to be interviewed and have counsel present. These
6 disclosures are routine. They have been ordered in other
7 cases.

8 THE COURT: But not for truly unaffiliated
9 parties, right?

10 MS. BRIESACHER: It is correct that there has been
11 the case law --

12 THE COURT: Nonparties.

13 MS. BRIESACHER: The case law that we found --
14 this issue doesn't come up very much, probably because these
15 things are generally routine and most times they're used as
16 a default, but the cases that we work under are a little
17 unique because it is plaintiffs bringing most of these
18 motions in order to seek the court's permission to contact
19 certain current or former employees.

20 THE COURT: And I agree it makes perfect sense for
21 those. I'm just trying to understand where in the case law
22 or in the rules I would find support for the idea that
23 someone who is not a current or former employee should be
24 told that they've got a right to have counsel present for an
25 interview.

1 MS. BRIESACHER: Well, Your Honor, I think it
2 again goes back to 4.3 and 4.4. And, you know, for those
3 individuals that plaintiffs believe are truly third party
4 and neutral, non-adverse, I think it kind of goes back to
5 the rules of avoiding misunderstanding and ensuring that
6 your methods of obtaining evidence aren't violating anyone's
7 legal rights.

8 So it's certainly true that nobody has an
9 obligation to talk to them and that they can have a lawyer
10 of their choosing present. But, at a minimum, Your Honor,
11 for these individuals that plaintiffs believe to be
12 non-adverse third parties, we would request that there be
13 some basic disclosures. The first three that we would
14 propose: You identify yourself and your affiliation; you
15 identify the purpose of the call, seeking information about
16 the lawsuit; and you ask the person if they're represented.

17 If third parties are provided those three basic
18 disclosures, it would address what brought our motion, the
19 concerns that brought our motion today, and that's to check
20 that plaintiffs' assumptions are in fact accurate as to
21 whether the person is adverse or neutral.

22 Your Honor, plaintiffs essentially here are trying
23 to argue no harm no foul. They assert this motion is
24 unnecessary because there was no substantive discussion with
25 Mr. Reininger, and they allege they have not contacted any

1 other represented parties.

2 Now, frankly, we can only take them at their word
3 that they haven't contacted anyone else; although, their
4 investigator did say, you know, that he had no substantive
5 communications with any other represented parties. I'm not
6 really sure what that means. But even if we take them at
7 their word that no one else has been contacted, you know,
8 this motion and an order like this may not have been
9 necessary kind of before this became an issue and before we
10 learned of what happened and they initially denied it and
11 then called it an inadvertent error, but now we live in a
12 world where they have contacted a senior executive and
13 contacted a senior executive who had no idea who they were.

14 So the reality is really there is no harm in
15 setting clear guidelines, Your Honor, on what is expected
16 when either side contacts a witness, particularly given the
17 massive gray area that exists, and that we know of at least
18 one senior investigator had no idea this happened.

19 So that's really what we're asking here today,
20 guidance to avoid ambiguity, to ensure the parties are on
21 the same page, and to ensure this doesn't happen again.

22 THE COURT: All right. Thank you.

23 Ms. Scarlett.

24 MS. SCARLETT: Shana Scarlett from Hagens on
25 behalf of the Consumer Indirect Purchaser Plaintiffs.

1 THE COURT: I'm going to have you raise the
2 podium, or at least the microphone, to make sure we can all
3 hear.

4 MS. SCARLETT: So Mr. Isaacs is a case
5 investigator that is employed full-time by my firm, Hagens
6 Berman. He works in the office that I work in, the Berkeley
7 office, of which I'm a managing partner. Mr. Isaacs has
8 worked extensively with my firm doing this type of case
9 investigation.

10 In a world where *Twombly* came down from the
11 Supreme Court and it became much more difficult to have
12 antitrust cases being brought, especially where conspiracies
13 oftentimes operate in secret, my firm performs extensive
14 case investigations before bringing cases like this one, the
15 pork antitrust case.

16 This case was brought in June 2018. We conducted
17 over six months of investigation prior to bringing the case.
18 We had case investigators discussing the industry with
19 witnesses. We spoke to former employees of the companies.
20 We engaged economists. We used trained investigators to
21 talk to these witnesses outside of the firm. We reviewed
22 extensive public records.

23 These types of cases are extraordinarily
24 difficult, and we want to get them right, and we want to
25 make sure that we are bringing cases that have merit. We're

1 very cautious. It is our firm policy to only contact former
2 employees, even though there are circumstances where it
3 would be fine to contact current employees. We have just
4 made it a firm policy, as Mr. Berman, our managing partner,
5 made clear in his declaration, that our investigators are
6 instructed only to avoid current employees.

7 What happened here was a simple mistake. Our case
8 investigator is an extraordinary gentleman. He has an
9 incredible history as an investigative journalist in an
10 industry that, as some of us know, is not doing well. He
11 was a professor, so he taught at U.C. Berkeley. He taught
12 Investigative Journalism. He conducted in-depth
13 investigations into criminal ongoings in casinos. He's just
14 an extraordinary man who operates to the highest
15 professional standard.

16 THE COURT: So how did this happen?

17 MS. SCARLETT: So let me explain how this
18 happened. There are 12 defendants in this case. At one
19 point in time, we were discussing 391 custodians. The teams
20 discussing custodians were split across firms and even split
21 across groups within my firm.

22 Mr. Isaacs, our case investigator, was conducting
23 interviews at the time and did have lists of the current
24 employees, but these org charts are very opaque. They're
25 not initially very easy to understand. This was just a

1 simple mistake.

2 Mr. Isaacs' practice, our practice as a firm, is
3 to make contact with someone and then first verify their
4 identity and that they are the person that we're looking
5 for. When Mr. Isaacs tried to identify the identity of
6 Mr. Reininger -- and I might not be saying that right -- the
7 witness misrepresented that he was not affiliated with the
8 pork industry. Had he have said he was affiliated with the
9 pork industry, then the series of disclosures that normally
10 happens would've happened here and it would've been
11 confirmed that he was a current employee and the call would
12 have ended. So but for that misrepresentation by the
13 defendant's employee, we would not be in this situation.

14 We all agree this was just a two-minute call. We
15 didn't go back to the phone records, but we're just assuming
16 the defendants are correct in asserting it was a two-minute
17 call. That's a very short period of time.

18 Mr. Isaacs told Mr. Reininger that he was
19 interested in speaking with hog farmers. I think that
20 clearly indicates he did not have any understanding that
21 this was an employee from one of the defendants when he said
22 he was particularly interested in speaking with people who
23 had worked on a farm.

24 At the time of these phone calls, we were
25 investigating the structure of the industry. We were not

1 trying to contact the current or former employees of the
2 pork defendants. We were looking much more strictly at the
3 industry itself in trying to determine how that is the same
4 or different from other industries. When Mr. Reininger said
5 he was not affiliated with the industry, the call ended.

6 The guidelines proposed by the defendants are
7 vastly overbroad. First of all, they would impede our
8 ability to talk to others unaffiliated with the defendants.
9 We are the Indirect Purchaser Plaintiffs. We need to show
10 pass-through. We need to show an overcharge due to
11 conspiracy and that that was passed through down to the
12 class, the consumers that ended up buying this pork.

13 We conduct many interviews. We issue subpoenas.
14 We negotiate data. We talk to a lot of people about that
15 very issue, the issue of pass-through. Defendants' proposed
16 guidelines would impact all of those interviews. When we
17 call to ask someone for essentially how does pricing at a
18 grocery store work, under defendants' guidelines we would
19 then have to say to them -- ask whether or not they are
20 currently represented, tell them they have the right to
21 refuse to be interviewed, tell them they have the right to
22 counsel of their choosing. These type of disclosures in
23 that context would be almost, you know, deafening for
24 plaintiffs' investigation and stop us from being able to
25 talk to industry participants that we need to talk to to

1 fully understand this case.

2 The defendants say we have a dispute over timing
3 where they are asking for this to be made at the outset of
4 the interview. From our perspective, this is something we
5 already do. Had in this instance Mr. Reininger accurately
6 said that he was affiliated with the industry and our case
7 investigator been able to confirm that this was the man that
8 he was intending to talk to and he said he was affiliated,
9 the next series of questions would have been confirming
10 whether or not he was employed by a defendant and the call
11 would've terminated.

12 THE COURT: So who did he think he was talking to?

13 MS. SCARLETT: So we spent a lot of time trying to
14 backtrack how this happened and we can't precisely. All I
15 can say to you is that from what I know working with case
16 investigators, which I have been doing 20 years, oftentimes
17 we get names through someone else. So we'll speak to
18 someone. We'll get that information. They're helpful to
19 us. And we'll say to them: Do you know anyone else who
20 would be willing to speak to us? It's my best guess that
21 that's how this happened and how we got his name. And it
22 was divorced from any Google search that would have, as
23 defense counsel had said, turned up immediately that he was
24 an employee of one of the defendants.

25 THE COURT: Even though he told -- as I understand

1 it, Mr. Isaacs told Mr. Reininger that he understood he had
2 worked for companies in the pork industry?

3 MS. SCARLETT: But Mr. Isaacs believed that he was
4 one of the farmers, which is what our investigation was
5 looking at.

6 THE COURT: So what does industry mean?

7 MS. SCARLETT: I think industry is very overbroad,
8 and there's a big difference between wanting to talk to one
9 of the pork farmers that are selling the hogs versus one of
10 the pork processors that are further up the chain that are
11 the defendants in this case. So that's where the disconnect
12 was.

13 So at the outset, the interview on a call that was
14 very short, two minutes, when these types of disclosures
15 oftentimes take up to ten minutes. Many times witnesses
16 have a lot of questions about who we are. Hagens Berman.
17 We often refer them to our website. We have this case
18 listed on our website. There are oftentimes the list of the
19 counsel and our attorneys on the case. We go over who those
20 are. We go over who we are before we ever get into what is
21 the substance of the back and forth of the questions that
22 our case investigator would have about this.

23 So when the defendants are asking for disclosures
24 to be made at the outset -- and what I think I heard my
25 opposing counsel say even in a voicemail -- that type of

1 thing simply is not feasible conducting these types of case
2 investigations.

3 For example, even leaving it in a voicemail were
4 this to be required for us in conducting interviews of any
5 non-party in this industry, would we need to leave all of
6 this information in a voicemail, for example, for a
7 non-testifying expert that I'm trying to retain from a
8 university? How much is it that we need to leave in that
9 initial voicemail? There is a certain unworkability about
10 the defendants' proposal.

11 The second part of their guidelines are that we
12 inquire whether or not the employee is current. Of course,
13 that's something that we do as soon as we can verify. But
14 there is that first step of verifying identity that needs to
15 happen.

16 Defendants have also requested that we inquire
17 whether the individual contacted is currently represented,
18 but that's not the test. The test is whether or not they're
19 currently represented and it has to be the subject of the
20 representation. And *McCormick*, cited by defendants, makes
21 this clear. It's not simply where someone is represented
22 and, say, for example, has a family attorney, has a personal
23 injury attorney because of a car accident. There are many
24 instances where people are represented that are completely
25 unrelated to the subject matter, which is another part of

1 their guidelines that they are requesting that's
2 extraordinarily overbroad.

3 Whether or not the witness has the right to have
4 the counsel of their choosing is another perplexing one.
5 And I think Your Honor picked up on this. This is something
6 that has been ordered in other cases, but not to the breadth
7 here. And for witnesses that are being contacted and
8 interviewed that makes it sound as if there are criminal
9 proceedings that are being engaged, that they have the right
10 to the counsel of their choosing. Of course, they could
11 have any counsel they choose, but then they'd have to pay
12 for it. And it becomes a very burdensome and onerous task
13 to have industry participants have to retain individual
14 counsel and then pay an hourly rate of \$200 an hour to
15 simply have an interview with us where we're only seeking
16 background information, for example, about hog farming and
17 what does the practice of hog farming look like, and who
18 owns the hogs, how are they sold, are there are auctions,
19 basic questions like this that in truth there is no real
20 need for that person to have counsel of their choosing as
21 would be suggested in a criminal investigation.

22 THE COURT: Let me back up a moment to verifying
23 identity.

24 MS. SCARLETT: Absolutely.

25 THE COURT: What exactly does that mean to you or,

1 more precisely, what exactly does that mean to your
2 investigators? Because, I mean, presumably he ascertained
3 that John Reininger was John Reininger. Was that verifying
4 identity or -- because it didn't verify what needed to be
5 verified to ascertain more quickly that the call needed to
6 conclude.

7 MS. SCARLETT: So I can speak more generally about
8 what I know when we verify the identity. Oftentimes we'll
9 have a name and a city and that's it. And it's very
10 difficult to know whether or not the name of the person that
11 you have -- there may be, let's say, Joe Scott in Blaine,
12 Washington. There might be seven Joe Scotts in Blaine,
13 Washington. We need to make sure that we have the right Joe
14 Scott, the one that worked in the industry. So there is a
15 series of questions.

16 And at the same time I think you are trying to
17 build a rapport with the witness to see if they are
18 comfortable talking to you or not; some people are not.
19 Some people hang up the phone right away. To build that
20 rapport is part of it.

21 So when verifying the identity, it is to make sure
22 (1) that they are the person that you thought they were; (2)
23 that they are in the geographical location that you thought
24 they were; and then whether or not they are participating in
25 the industry that we are investigating. And so verifying

1 identity have kind of those three steps to it.

2 And, again, when Mr. Isaacs had asked the question
3 of whether or not he was affiliated with the pork industry,
4 the answer was no, and that's when the call was terminated.
5 So it's a critical part to know that the person Joe Scott
6 that we're trying to call is actually affiliated with the
7 pork industry and we're not just broadly announcing to
8 people who have no interest in it that, you know, we're
9 investigating the pork industry for certain parts of
10 collusion. That's not something that we would speak broadly
11 about during any phase of the case, other than being in
12 court with Your Honor.

13 THE COURT: So what then stopped Mr. Isaacs or
14 what inhibited Mr. Isaacs from asking the question -- and
15 I'm going to set aside the emails. I understand your points
16 on that. But once there was a live conversation going on,
17 what stopped Mr. Isaacs from asking him at an earlier point
18 in this conversation?

19 I guess two minutes on the phone is in the eye of
20 the beholder. There are some calls where two minutes is way
21 too long as far as I'm concerned, but that's another
22 subject. But what stopped Mr. Isaacs from asking the
23 question much earlier in the conversation are you affiliated
24 in any way with the pork industry? It sounds like if
25 Mr. Reininger had said no, the call would have ended then.

1 If he would have said yes, of course, the next questions
2 would have needed to be with whom or in what capacity so
3 that then he could figure out whether he needed to shut down
4 the call.

5 MS. SCARLETT: Again, this is hearsay. And I want
6 to emphasize again that I trust Mr. Isaacs implicitly. I
7 believe he comports himself according to the highest
8 professional standards.

9 It's my understanding that he was trying to get at
10 whether or not this witness has an affiliation with the pork
11 industry. That is why he was saying that he was interested
12 in speaking with hog farmers, particularly interested in
13 speaking with people who worked on a farm.

14 It's our belief at Hagens Berman that he did get
15 to the identity verification as quickly as he could. It
16 took two minutes or less than two minutes. From our
17 perspective, that's a short period of time after you start
18 going through introductions and asking the name and pauses
19 and how fast people speak. Two minutes to us seems like a
20 very short period of time for Hagens Berman to have gotten
21 to the point where there was a lack of verification working
22 on this person in the industry and the call was terminated.

23 So from my perspective, I, again, trust Mr. Isaacs
24 and trust him to have done everything properly. When he
25 says it took a minute and a half, a minute and 45 seconds to

1 get to that point, I trust that that was true and that he
2 was trying to explain to the witness that he was interested
3 in hog farmers.

4 THE COURT: Have you made changes to your protocol
5 or are you proposing to make changes to your protocol either
6 in the preparation for the calls or on the calls themselves
7 to assure that something like this doesn't happen again?

8 MS. SCARLETT: So we have made one change to our
9 protocol. So, again, I've been doing these type of witness
10 interviews for 20 years, and we only give a privilege
11 instruction to not divulge privileged information if after
12 talking with the witness and verifying that they are a
13 former employee and they worked for the company during the
14 time period we're interested in.

15 If we believe because of their position they might
16 be in a place to have access to privileged information, we
17 give them a very strong instruction that they are never to
18 divulge privileged information to us.

19 We don't give that instruction usually if it's
20 just a person involved in an industry or if it's a former
21 employee that was not in a position that we would believe
22 they would ever have access to in-house counsel or outside
23 counsel. So we've changed that instruction.

24 At this point, before the interview is to be
25 conducted, we will in this case give an instruction that

1 they should not divulge privileged communications during the
2 interview, regardless of whether or not we believe they
3 would be in a position to have those communications.

4 THE COURT: If we were to think about the
5 disclosures that your investigator makes to someone that
6 they come to believe is not a current or former employee
7 versus the disclosures that they make if they determine
8 someone is a former employee -- because my understanding is
9 once they conclude someone is a current employee, boom, call
10 is over.

11 MS. SCARLETT: Correct.

12 THE COURT: So if we would look at the difference
13 between your protocol or in what you would be willing to
14 agree that your protocol ought to include between the person
15 that I now understand -- I'm making the call. I now
16 understand this person, as far as I can tell, wasn't ever
17 employed versus this person -- it appears this person seems
18 to have been a former employee of Clemens, what's the
19 difference between the disclosures you agree should be made?

20 MS. SCARLETT: So I think that would be the big
21 difference in the two disclosures. For anyone that has ever
22 worked at a company we now give them a privilege
23 instruction.

24 For someone who is never affiliated with a company
25 and we're simply talking to them about more neutral topics

1 like pass-through or a professor that we want to interview
2 or a non-testifying consultant -- there's honestly a list
3 too long for me to go through; I'm just giving you the three
4 examples off the top of my head -- but for those we make
5 sure that it's clear who we are, what firm we are, what case
6 this is regarding. And usually there is a conflicts check
7 run by phone, whatever it is, and then the interview would
8 proceed.

9 So I think the big difference between those two
10 buckets is really that now our protocol includes the
11 instruction of privilege.

12 THE COURT: When you say the "instruction of
13 privilege," regardless of what that person's role was with
14 the company, whether or not there is reason to believe that
15 they were at a position where they might have had access to
16 privileged information?

17 MS. SCARLETT: That's correct, Your Honor. But we
18 think that's well beyond what the case law requires.

19 THE COURT: I understand the distinction you're
20 drawing, but I just want to make sure I understand what that
21 protocol now is.

22 Okay. Anything else?

23 MS. SCARLETT: No, Your Honor.

24 THE COURT: All right. Thank you.

25 Yes.

1 MR. CLARK: Your Honor, I told you I wouldn't
2 speak and here I am.

3 THE COURT: Here you are.

4 MR. CLARK: Brian Clark, Direct Purchaser
5 Plaintiffs.

6 You asked counsel for Clemens regarding the meet
7 and confer process under Local Rule 7.1(a) and whether it
8 was adequate. The answer is no. As we submitted in our
9 Docket No. 381, there was no meet and confer whatsoever with
10 the Direct Purchaser Plaintiffs. Our notice of this issue
11 at all was from the filing by defendants.

12 I heard the word repeated again and again today of
13 "plaintiffs" broadly, including all three classes. We filed
14 our papers assuming that defense counsel would correct their
15 incorrect statement in their meet and confer statement and
16 also in their brief lumping all plaintiffs together.

17 We stated clearly we were not involved with this
18 conduct. It makes me question why there hasn't been a
19 corrected filing or correction to the meet and confer
20 statement since the time we filed this on October 15th.
21 It's over a month later now. I just would like to make that
22 clear.

23 I have continued to hear the word "plaintiffs"
24 used throughout the proceedings today and, as far as I know,
25 this is a motion regarding the Consumer Indirect Purchaser

1 Plaintiffs, not Direct Purchaser Plaintiffs or my colleagues
2 with the Commercial and Institutional Indirect Purchaser
3 Plaintiffs.

4 THE COURT: All right. Thank you.

5 MR. CLARK: Thanks.

6 THE COURT: Mr. Raiter.

7 MR. BERNICK: Your Honor, this is Justin Bernick,
8 counsel for Agri Stats. I have one thing I would like to
9 raise. I also did not anticipate speaking. If now is the
10 appropriate time, I'd be happy to do that.

11 THE COURT: Now would be fine, and then I'll get
12 to Mr. Raiter. Go ahead, Mr. Bernick.

13 MR. BERNICK: Thank you, Your Honor.

14 So there's been a suggestion here that this was an
15 isolated incident, that the plaintiffs' focus here is on
16 contacting non-parties and other individuals. We had a
17 similar situation with Agri Stats that we alerted plaintiffs
18 to where Mr. Isaacs contacted a current Agri Stats employee.

19 Again, this employee, their profile makes it clear
20 they are a current employee. He left a voicemail saying he
21 was a researcher calling Agri Stats employees and asked her
22 to call back. And, thankfully, this woman had the presence
23 of mind to reach out to the Human Resources person in Agri
24 Stats to try to confirm what was going on. We chased it
25 down. But she was very confused.

1 She didn't know who was calling her, didn't know
2 if it was us -- the attorneys for Agri Stats -- reaching out
3 to her asking questions, which we obviously have been doing
4 in the course of representing the company or --

5 THE COURT: Hold on. Hold on. Mr. Bernick, you
6 are speaking way too fast.

7 MR. BERNICK: Oh, I'm sorry.

8 THE COURT: Go ahead. Why don't you back up a few
9 sentences and take it a little slower.

10 MR. BERNICK: Absolutely. I apologize, Your
11 Honor.

12 So I was just relaying the details of a particular
13 incident related to Mr. Isaacs and Agri Stats. He left a
14 voicemail for a current Agri Stats employee, Ms. McGettigan,
15 who her LinkedIn profile also discloses that she is a
16 current employee of Agri Stats. The voicemail that
17 Mr. Isaacs left for her said that he was a researcher
18 calling Agri Stats employees, please give him a call back.

19 And thankfully this individual had the presence of
20 mind to reach out to the internal HR person at Agri Stats --
21 there is no in-house counsel at Agri Stats; they're a small
22 company -- to try to confirm what this was.

23 She didn't know if it was us, Agri Stats' outside
24 counsel, contacting her, as we have done from time to time
25 to ask questions about the case, or if this was somebody

1 else. Thankfully, she raised it up the flagpole and did not
2 call him back.

3 The only reason I raise that is because I think
4 there's been a suggestion here that this only relates to
5 non-parties and that this was an outlier. It sounded from
6 the voicemail that this was a deliberate strategy to reach
7 out to employees, or at least former employees, but
8 certainly employees and parties. And the voicemail did not
9 provide sufficient disclosure for this individual to know
10 who the individual was.

11 We raised the issue with plaintiffs and they
12 responded and said that from their vantage point, everything
13 was above board. We disagree with that position. But I
14 wanted to make sure that I made that point because I wasn't
15 aware that the plaintiffs would be taking the position that
16 this was somehow an outlier or some sort of anomaly. From
17 our vantage point, this seemed from the voicemail to be a
18 deliberate strategy of reaching out to the employees of the
19 parties.

20 THE COURT: All right. Thank you, Mr. Bernick.

21 Mr. Raiter.

22 MR. RAITER: Thank you, Your Honor.

23 I echo the comments from Mr. Clark. On behalf of
24 the Commercial Indirects, there was no attempt to meet and
25 confer by the defendants. There was no notice of this issue

1 to us. And the suggestion that it is plaintiffs, which is
2 intentional, is misleading. They keep doing it. We just
3 heard it on the phone. It wasn't the plaintiffs. It wasn't
4 the Commercial Indirects. It wasn't the Directs.

5 That is not to say that this contact was
6 inappropriate in any sense, but the suggestion that we're
7 all lumped together here as plaintiffs is simply wrong and
8 it's misleading. It was pointed out to defense counsel and
9 they have not corrected it and they should. They have no
10 motion before us this morning or directed to the Commercial
11 Indirects. They haven't made such a motion. They didn't
12 meet and confer about such a motion. And to suggest that we
13 should all be lumped in together, again, is inappropriate.

14 MS. SCARLETT: May I respond briefly to
15 Mr. Bernick?

16 THE COURT: Okay, but then I want to give
17 Ms. Briesacher an opportunity to respond as well. Yes. Go
18 ahead.

19 MS. SCARLETT: I just want to respond to
20 Mr. Bernick from Agri Stat's suggestion that this is a
21 deliberate strategy by the plaintiffs. I would just point
22 out, Your Honor, that was a voicemail. Our case
23 investigator never spoke with the employee; had he, the
24 first steps would have been to verify identity and then to
25 discover whether or not she was a current employee of one of

1 the defendants and then the call would have terminated.

2 To suggest --

3 THE COURT: So are you saying it's incorrect that
4 the voicemail from Mr. Isaacs said I'm trying to reach
5 employees of Agri Stats? I'm trying to talk to employees of
6 Agri Stats?

7 MS. SCARLETT: As I'm standing here today, I just
8 don't know whether or not that's what Mr. Isaacs would say
9 and that the voicemail said or not. I just don't have any
10 information on that. But I can just tell you it is our
11 policy to not speak with current employees.

12 And so to suggest there is a deliberate strategy
13 here is incorrect versus what we see the state of affairs,
14 which is a very large case with 12 defendants, many of whom
15 have hundreds of employees, that there are now arguably two
16 incidents where a current employee was conducted. But had
17 our investigator gone through the steps, the call would have
18 terminated. We have no intention of speaking with current
19 employees.

20 THE COURT: Let me just ask one other question.
21 With respect to the practicalities of what can or can't be
22 said on a voicemail, what if, for example, the protocol
23 called for the investigator on the voicemail to disclose who
24 he was and who he was calling on behalf of?

25 MS. SCARLETT: If a protocol were in place that

1 required, for example, a case investigator to say I'm so and
2 so and I work for this law firm, I think the practicality of
3 that would be very few people would call us back. When
4 people hear that there is a law firm, they are generally
5 fearful that they're in trouble and that they have done
6 something wrong.

7 I think that having that kind of protocol, which
8 we don't see in the case law, we've never seen required by
9 any other court, is the type of thing that has a real
10 chilling effect on case investigations, which brings you
11 back to my opening statement and why I told you this is
12 necessary. These cases are very difficult. Conspiracies
13 conduct themselves in secret. And without the ability to
14 have a factual investigation take place, many of these types
15 of cases would not be brought.

16 THE COURT: Okay. Thank you.

17 Ms. Briesacher.

18 MS. BRIESACHER: Your Honor, I'd first like to
19 address the comments made by the other two groups of
20 plaintiffs.

21 So when we -- as we kind of were preparing for
22 this motion, you know, we did direct our meet and confer
23 efforts at the party whose conduct we had concerns about,
24 and that was the Consumer Indirect Plaintiffs.

25 It is fair to say that we did not meet and confer

1 with the other two groups of plaintiffs because we had no
2 reason to believe they were engaging in similar conduct.

3 We raised and filed this motion again focusing on
4 the party whose tactics we were concerned about. Again,
5 that's the Consumer Indirect Plaintiffs. I think our motion
6 makes clear kind of whose conduct we're troubled by.

7 But in this instance, you know, we're not asking
8 for sanctions. We're not asking for anyone to be
9 disqualified. We're here really asking for the Court's
10 guidance.

11 THE COURT: But you are asking for an order that
12 would apply across the board, including to all plaintiff
13 groups, presumably to all defendants as well.

14 MS. BRIESACHER: Correct, Your Honor. We're just
15 asking everyone to follow the ethical rules. And I would
16 anticipate that any guidance or orders that the Court issued
17 would be applicable to everyone, not just one group of
18 plaintiffs.

19 Second, I wanted to address the voicemail point.
20 We do not assert that all six disclosures need to be made on
21 a voicemail. But, at a minimum, the plaintiffs should be
22 indicating who they are and who they're representing and the
23 purpose of the case. I know plaintiffs have concern that
24 they think it's going to lead to some confusion or
25 misunderstandings about what the call is about, but the

1 reality is right now they're being misleading in a voicemail
2 saying they're researchers and then they're on a call and
3 not immediately correcting that misunderstanding that they
4 have created.

5 THE COURT: But as long as -- I guess isn't it
6 what matters is that the necessary disclosures are made
7 before substantive information is gathered, information that
8 would go to the merits of claims or defenses in the case?

9 MS. BRIESACHER: Your Honor, I think that this
10 case, kind of what happened here, shows that just saying it
11 needs to happen before substantive communications is too big
12 of a gray area.

13 THE COURT: Well, what substantive communications
14 happened here?

15 MS. BRIESACHER: Your Honor, here -- I mean, the
16 call -- well, the call did stop after two minutes, but there
17 were significant -- I mean, two minutes is a long time.
18 They asked about his experience hog farming. They were able
19 to ask him if he worked on a hog farm between certain years.
20 I know that there seems to be a fact dispute about what was
21 discussed. If what the plaintiffs say is true, that they
22 asked are you John Reininger, do you work for the pork
23 industry and he said no. That's a 10-second conversation.
24 So clearly there were more discussions here.

25 During the course of these discussions,

1 Mr. Reininger was still under the false -- kind of the false
2 belief that this was an academic researcher. He didn't know
3 that they were the plaintiffs.

4 So if you don't say it immediately -- hi, I'm so
5 and so, I work for the plaintiffs, I'm here to talk about
6 this case -- you run the risk of substantive communications
7 happening then before these disclosures be made.

8 So, Your Honor, we're here just asking for a
9 simple rule at the outset of the call and not to have
10 several minutes go by before these disclosures be made,
11 because then you risk what we are concerned about and that
12 these substantive discussions and privileged communications
13 could be revealed because the person doesn't understand who
14 they are on the phone with.

15 Thank you.

16 THE COURT: I am concerned that there was not, as
17 my practice pointers require, an actual interactive
18 conversational meet and confer. I can't tell from this
19 conversation whether that would be a waste of time or not.
20 It sounds like there are some areas where the parties are in
21 agreement. It sounds like there are some others where
22 probably they wouldn't be. But I'd still like you to have
23 gone through that step of giving it a try, of sitting down
24 and thinking about what things you can agree you want to
25 avoid, what things you can agree ought to be part of a

1 protocol, and if you still depart/diverge where those
2 limited areas are.

3 I am concerned about what happened here. And I
4 have no reason to doubt your representations about
5 Mr. Isaacs, but I am concerned that, given Mr. Reininger's
6 position in Clemens and how easily discernible it would have
7 been from a number of sources, I am concerned that that call
8 was made.

9 On the other hand, I don't have anything on the
10 record, or otherwise, to tell me that there was some
11 substantive information passed along.

12 I'm hearing Mr. Bernick saying that there was a
13 contact with another current employee, but I don't have
14 anything in the record to that effect. Not that I doubt
15 Mr. Bernick, but I don't have anything from anybody who was
16 directly involved in that call about what happened.

17 I do believe that what defendants are asking for
18 goes beyond what you're entitled to get, and I don't think
19 anything that happened here justifies going that far. But I
20 don't want to have you back here every month or six weeks
21 either arguing about, well, did this one cross the line or
22 did that one cross the line.

23 So I do think it would make sense for you all to
24 take a good-faith run at sitting down together, including
25 the plaintiffs who weren't a part of this, because I'm not

1 sure -- I mean, I could enter a limited order, if I were so
2 inclined, directed to one set of plaintiffs, but it would be
3 much better if there was a set of basic working rules of the
4 road that applied across the board and not on a
5 party-by-party basis.

6 So I am going to require you to take a shot at
7 seeing whether you could agree to some kind of stipulation
8 for this is how we're going to approach these contacts going
9 forward. And I'm going to have you -- you're welcome to use
10 one of the lovely conference rooms that are here; or if
11 you've got flights to catch and that's not going to work, to
12 set up a time to talk on the phone. But I'm going to
13 require that you get back to me -- what day is today? Oh,
14 my calendar says it's January 2020 already. That's not
15 right. Okay. So today is the 19th. I would like -- and
16 we've got Thanksgiving in the middle of things. I want you
17 to get back to me with a joint report by December 2nd and
18 let me know whether you've been able to agree to all of or
19 most of, let's say, some rules of the road, whether they're
20 by stipulation or by -- however you want to express it, but
21 something that leaves everybody comfortable that you're all
22 on the same page; or, if not, how far you did get by way of
23 agreement and where you part company.

24 And then based on that, I'm going to hold this
25 motion in abeyance for the time-being. Let me see what you

1 report back to me. I think you can tell by the questions
2 I'm asking where I've got concerns and on both sides.

3 By way of one more piece of guidance, I am
4 inclined to agree that as long as a voicemail doesn't
5 affirmatively misrepresent who somebody is calling from, I'm
6 not inclined to think that a voicemail is a really workable,
7 practical place to leave this information. But once you're
8 on the phone live, it seems to me you all ought to be able
9 to agree to some understandings about how the call will
10 proceed from there. I would at least like to give you that
11 opportunity.

12 So let me hear back from you by joint letter on
13 December 2nd. The letter probably ought to be e-filed,
14 rather than emailed, because I think it's important we have
15 a record of what you could or couldn't agree on. And then
16 once I get that, I'll see what's left of this motion, and I
17 will either bless the stipulation or I will take the motion
18 under advisement and get an order out as soon as I can.

19 Any questions about that direction?

20 MS. BRIESACHER: No, Your Honor.

21 THE COURT: All right. Thank you all.

22 Did I hang up on you all on the phone?

23 UNIDENTIFIED MALE SPEAKER: Thank you, Your Honor.

24 THE COURT: Thank you. If I don't see you before
25 Thanksgiving, have a good one.

1 (Court adjourned at 11:00 a.m.)

2 * * *

3 I, Debra Beauvais, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.

6 Certified by: s/Debra Beauvais
7 Debra Beauvais, RPR-CRR
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